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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-5435

PAUL KERN IMBLER,

Petitioner,

vs.

RICHARD PACHTMAN, District Attorney,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

The State of California through its Attorney General presents this brief as *amicus curiae* in support of respondent pursuant to Rule 42(4) of the Rules of this Court. Since petitioner seeks to abrogate the absolute immunity of public prosecutors from federal civil rights liability for acts arising out of performance of their quasi-judicial functions in the trial of criminal cases, California is deeply concerned that the loss of such immunity may impair the ability of its more than 2,000 state, county, and city prosecutors to enforce its criminal laws in the current forthright and fearless manner.

The overhanging specter of vexatious, but potentially successful damage suits may deter the prosecution of criminal cases involving close questions of constitutional law. For this reason, the State of California by and through its Attorney General presents this brief in support of absolute immunity.

Question Presented

Distilled to a single issue, petitioner is asking this Court to decide the extent of the immunity of a prosecutor to a lawsuit brought against him under the federal civil rights act in circumstances where the highest court in California has denied petitioner's application for habeas corpus relief by finding that the prosecutor did not knowingly adduce perjured testimony or suppress evidence but where a single federal judge later found to the contrary. (See Petn. Br. 19-22.)

Statement of the Case

A. The State Trial Proceedings

Petitioner, who was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder, took an automatic appeal to the California Supreme Court after a jury had fixed his penalty at death. *People v. Imbler*, 57 Cal. 2d 711, 713, 21 Cal. Rptr. 568, 569, 371 P. 2d 304, 305 (1962). At trial Mrs. Morris Hassen had testified that on the evening of January 4, 1961, two men attempted to rob her store and one of them shot and killed her husband. Three eyewitnesses who were in the vicinity, Alfred Costello, Alonzo Dunlap, and Billy Hillen all subsequently had identified petitioner as one of the assailants. *People v. Imbler, supra*, 57 Cal. 2d at 714, 21 Cal. Rptr. at 569-70, 371 P. 2d at 305-06. At

trial Costello had testified that he crossed the street when he heard a shot after he saw two men standing at the cash register in Mrs. Hassen's store, that he viewed petitioner wearing a hat and coat and still carrying a gun from a distance of 8 to 12 feet and that he chased petitioner while petitioner ran down an alley and dropped his hat. Costello further testified that then petitioner paused in the alley as if he was trying to decide which way to go during which time he could see petitioner without the hat at a distance of between 15 and 20 feet, that petitioner fired a shot that hit a wall behind him, discarded his coat, and fled to a parking lot and that he retrieved the coat and discovered a gun in it subsequently identified as the murder weapon. Costello positively identified appellant as the man he had pursued. *Id.*

At trial neither petitioner nor his counsel at any time complained that the prosecutor had knowingly or unwittingly suppressed any evidence or adduced perjured testimony from Alfred Costello. Similarly, no such claim was made when petitioner took his automatic appeal to the California Supreme Court.

B. The State Habeas Corpus Proceedings

Subsequently, petitioner filed an application for habeas corpus relief in the California Supreme Court which alleged that in his actions at trial the prosecutor had secured petitioner's conviction by knowingly using perjured testimony. *In re Imbler*, 60 Cal. 2d 554, 559, 35 Cal. Rptr. 293, 296, 387 P. 2d 6, 8 (1963). Pursuant to an order of the California Supreme Court, a referee took evidence on petitioner's claims. *In re Imbler, supra*, 60 Cal. 2d at 560, 35 Cal. Rptr. at 296, 387 P. 2d at 8. In upholding the referee's de-

cision that there was no use of perjured testimony, the California Supreme Court made the following rulings:

1. The fact that Costello testified at the reference hearing that petitioner was not the man he chased, whereas he had testified to the contrary at the preliminary hearing and the trial, did not constitute perjury but merely showed that Costello had changed his mind. *In re Imbler, supra,* 60 Cal. 2d at 560-61, 35 Cal. Rptr. at 296, 387 P. 2d at 9.

2. Costello's change in testimony at the reference hearing which cast doubt upon his very positive statements at the trial regarding his identification of petitioner had been thoroughly impeached and discredited by witnesses at the reference hearing, whereas his testimony at the murder trial itself concerning his identification of petitioner had been corroborated by the testimony of the other two eyewitnesses and was consistent with other circumstances in the case so that there was no knowing perjury. *In re Imbler, supra,* 60 Cal. 2d at 561-62, 35 Cal. Rptr. at 296-97, 387 P. 2d at 9-10.

3. There was no evidence that Costello willfully gave false testimony at the trial about seeing petitioner's photograph, but rather his testimony at the reference hearing showed he was confused about when he had seen a photograph of petitioner and the form of it. *In re Imbler, supra,* 60 Cal. 2d at 562-64, 35 Cal. Rptr. at 297-98, 387 P. 2d at 10-11.

4. While it was established at the reference hearing that Costello had given false testimony on redirect examination at the trial about receiving degrees from the University of California after his

release from state mental hospitals, petitioner had not proved any knowledge of those falsehoods by representatives of the State of California in that there was no evidence to show that any person connected with the prosecution knew of Costello's educational background, and the prosecutor had no reason to disbelieve or duty to verify the information Costello had given him during a recess immediately after the cross-examination about Costello's having had several college degrees. *In re Imbler, supra,* 60 Cal. 2d at 564-65, 35 Cal. Rptr. at 298-99, 387 P. 2d at 11-12.

5. While Costello had testified on cross-examination that he had only one felony conviction whereas his "make sheet" introduced at the reference hearing showed that he had two felony convictions, if the prosecutor was to be charged with knowledge of the contents of the "make sheet" petitioner had to be charged with this same knowledge. *Id.*

6. Despite petitioner's contention that Costello had perjured himself on redirect examination at trial when he testified that his commitment to the the state mental hospital was voluntary, Costello simply meant that he had voluntarily pleaded not guilty by reason of insanity under California Penal Code section 1026, which was the section shown at the reference hearing to have been the one upon which the commitment was based. *In re Imbler, supra,* 60 Cal. 2d at 565-66 and n. 3, 35 Cal. Rptr. at 298-300, 387 P. 2d at 11-12.

7. The fact that an expert for the prosecution changed his testimony at the reference hearing regarding the identification of one of the finger-

prints on an item of evidence as not being petitioner's did not indicate that he intentionally gave false testimony at the trial as to the number of fingerprints or as to whether they were identified, but rather was an honest error in expert testimony and was not perjury. *In re Imbler, supra,* 60 Cal. 2d at 566-67, 35 Cal. Rptr. at 300-01, 387 P. 2d at 12-13.

8. The outcome of petitioner's trial would not have been affected even if the police had suppressed the fact that a co-employee of petitioner's was unable to identify the coat dropped by the killer. *In re Imbler, supra,* 60 Cal. 2d at 568, 35 Cal. Rptr. at 301, 387 P. 2d at 13-14.

Because of improper statements by the prosecutor and improper instructions by the trial court, the California Supreme Court subsequently reversed the judgment imposing the death penalty upon petitioner pursuant to his second petition for writ of habeas corpus in the state courts. *In re Imbler,* 61 Cal. 2d 556, 557-58, 39 Cal. Rptr. 375, 376, 393 P.2d 687, 688 (1964). On remand, petitioner was sentenced on the murder count to life imprisonment. *Imbler v. Craven,* 298 F. Supp. 795, 797 (C.D. Cal. 1969); *Imbler v. California,* 424 F. 2d 631 (9th Cir. 1970), *cert. denied,* 400 U.S. 865 (1970).

C. The Federal Habeas Corpus Proceedings

After the United States District Court for the Eastern District of California denied petitioner's initial federal application for habeas corpus relief, the United States Court of Appeals for the Ninth Circuit reversed that decision and transferred the case to the Central District pursuant to 28 U.S.C. § 2241(d). *Imbler v. Craven, supra,* 298 F. Supp. 795, 797 (C.D. Cal. 1969). In that federal proceeding in the Central District the court took no new evidence whatsoever but instead considered "the complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon. . . ." *Id.*

Based upon the state court record alone and no new evidence, the single judge in the district court considering the habeas corpus petition determined that Costello had given false testimony at petitioner's trial as to (1) whether Costello saw petitioner's mugshots prior to the lineup; (2) whether he was voluntarily or involuntarily committed to a state hospital in 1946; (3) whether he had previously been convicted of more than one felony ; (4) whether he had attended any universities or obtained any degrees therefrom after his release from the mental hospitals and prisons; (5) whether he had earned an average of $10,000 a year for the four years preceding the trial and; (6) whether he had been trying to "straighten" himself out since he had been "in trouble with the law." *Id.* at 803. Unwilling actually to state that the prosecutor had had actual knowledge as to each of these allegedly false statements by Costello, the district court held that as to each of the six items either the prosecutor had actual knowledge of the falsity or, if he did not have such knowledge, he had reason to believe the testimony was false so that his reckless use thereof was to be treated the same as if he had knowingly used false testimony. *Id.* at 808-809. Specifically, the district court held:

1. The prosecutor had actual and definite knowledge that Costello's statement about his "voluntary" commitment to a state hospital was false and he purposely and intentionally led Costello to make that statement. *Id.* at 806;

2. Even if the prosecutor did not have knowledge that Costello had seen pictures of petitioner prior to the lineup, he was charged with the knowledge thereof because of the knowledge of the police thereto. *Id.;*

3. The prosecuting attorney knew that Costello had been convicted of more than one felony and, at least, deliberately failed to take full notice of the significance of the facts in the "make sheet" that showed Costello had been convicted of at least two other felonies. *Id.* at 807;

4. Since the prosecutor had reason to believe that Costello had not been attemtping to "straighten out," the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false when he asked Costello if he had been trying to do just that. *Id.;* and

5. Costello's false testimony about his two alleged university degrees and his claimed annual income was so highly suspect that it amounted to the reckless use of highly suspicious false testimony which should have been known to be false and it thus fell within the prohibition against the knowing use of perjured evidence. *Id.* at 807-08.

The district court also concluded that evidence of the third fingerprint had been suppressed by the police even if the prosecuting attorney was not aware of its existence or even if it was just negligently suppressed. *Id.* at 810-11. The district court, accordingly, granted the petition for writ of habeas corpus. *Id.* at 812.

Thus, even though there was no evidence that the prosecutor had adduced perjured testimony or suppressed evidence, the district court found that the prose-

cutor had denied petitioner a fair trial solely because he had not recognized the falsity of some statements made by Costello which the district court felt should have been apparent from a comparison with Costello's other statements and with various documents available at the time of petitioner's trial. On appeal the United States Court of Appeals for the Ninth Circuit affirmed the order of the district court. It held that the district court had accepted the " 'historical-fact determinations' " of the state court and instead had reached different conclusions from the state court in applying federal constitutional standards to those facts. *Imbler v. State of California,* 424 F. 2d 631, 632 (9th Cir. 1970).

D. The Federal Civil Rights Litigation

Subsequently, in the case of *Imbler v. Pachtman,* in the United States District Court for the Central District of California, case number Civil 71-123-RJK, petitioner sought damages against deputy district attorney Pachtman under the Civil Rights Act, 42 U.S.C. § 1983, on the grounds that respondent Pachtman knowingly adduced false and perjured testimony from Costello and that he had suppressed evidence at the trial. (*See* Appendix, pp. 104-06.) In ruling on the motion to dismiss by Pachtman, the district court limited itself to the specific factual allegations of petitioner's first amended complaint because it believed that there was no authority sanctioning, let alone requiring, that the findings made in the federal habeas corpus proceedings had to be applied as *res judicata* or collateral estoppel in favor of a plaintiff in a subsequent civil rights action growing out of the same incident especially where, as in the case at bar, the party defendants were different and there had been no showing of substantiality of interest between the defendant in the habeas corpus

proceeding and the then present defendants. (Appendix, pp. 106-07.) After a discussion of the basis for and scope of prosecutors' immunity (Appendix, pp. 107-110), the court granted the motion for dismissal as to respondent Pachtman despite the allegations that he acted "badly, perhaps wrongfully and even maliciously," producing perjured and false testimony in his attempt to convict petitioner because it appeared that "the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege." (Appendix, p. 111.)

Petitioner appealed from the district court's dismissal of his civil rights complaint. *Imbler v. Pachtman*, 500 F. 2d 1301 (9th Cir. 1974). The Ninth Circuit affirmed the dismissal of the complaint, stating that the dismissal by the lower court was consistent with that court's prior decisions. *Id.* at 1302. It concluded that the acts of respondent Pachtman which allegedly harmed petitioner occurred during prosecutorial acts that could only be characterized as an " 'integral part of the judicial process.' " *Id.* It also rejected petitioner's claim that respondent Pachtman engaged in non-immune police activity when he asked two police officers during a recess to discuss criminal charges with the prosecution's chief witness since that was a quasi-judicial act within the purpose of the immunity. *Id.* at 1303 and n. 3. It further held that this Court's decision in the case of *Scheuer v. Rhodes*, 416 U.S. 232 (1974) did not require a contrary result because that case dealt with the immunity of executive officers whereas prosecutorial immunity is not a form of executive immunity but rather one of judicial immunity. *Id.* at 1304 and n. 4. Finally, after noting that the Cali-

fornia Supreme Court on precisely the same facts which were before the district court in the habeas corpus proceeding had found there was no evidence that the prosecutor had knowingly used perjured testimony, the Ninth Circuit held that the determinations of the federal district court in the habeas corpus proceeding were not *res judicata* as to respondent Pachtman because he was not actually a party to the habeas corpus proceeding and thus in any other suit under the Civil Rights Act against the prosecutor a full trial would be required, which was a burden and risk which immunity was designed to prevent. *Id.* at 1304 and n. 6.

Subsequently, petitioner filed his petition for writ of certiorari in this Court. Certiorari was granted on February 24, 1975.

ARGUMENT

Public Prosecutors Should Remain Immune From Civil Rights Liability for Acts Committed in the Performance of Duties Constituting an Integral Part of the Judicial Process

In *Pierson v. Ray*, 386 U.S. 547, 554 (1967), this Court noted that the legislative history of section 1 of the Civil Rights Act of 1971, 17 Stat. 13, now 42 U.S.C. § 1983, gave ". . . no clear indication that Congress meant to abolish wholesale all common-law immunities." Earlier in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court viewed immunity as a tradition so rooted in "history and reason" as to preclude any legislative intent to exclude it. In *Pierson v. Ray, supra*, this Court found that "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." 386 U.S. at 553-54. As a consequence, this Court held that, had Congress wished to abolish judicial immunity, it would have specifically so provided when it enacted 42 U.S.C. § 1983.

California submits that the quasi-judicial immunity of public prosecutors is as well grounded in "history and reason" as the immunities of state legislators in *Tenney* and those of judges in *Pierson*. Well prior to the enactment of 42 U.S.C. § 1983, Blackstone recognized the importance of prosecutorial immunity when he stated that ". . . it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried." 3 W. Blackstone, *Commentaries* 126 (St. George Tucker ed. 1803). Indeed, the doctrine of prosecutorial immunity was so well established by the earlier part of this century that this Court was enabled to affirm summarily a definitive application of the doctrine by the Second Circuit. *Yaseli v. Goff*, 12 F. 2d 396 (2d Cir. 1926), *affirmed per curiam*, 275 U.S. 503 (1927). The common-law antecedents of prosecutorial immunity were fully canvassed in the Second Circuit opinion, which found the quasi-judicial immunity of prosecutors to be coextensive with that accorded to judges. 12 F. 2d at 404, 406. The doctrine of prosecutorial immunity recognized in *Yaseli v. Goff* was reaffirmed by this Court in *Barr v. Matteo*, 360 U.S. 564, 569 (1959), when it was again observed that an absolute immunity like that of judges ". . . extends to other officers of government whose duties are related to the judicial process."

The foregoing precedents demonstrate that the doctrine of prosecutorial immunity has common-law origins as well recognized as those of the judicial immunity upheld in *Pierson v. Ray*. The authorities canvassed in the definitive opinion of the Second Circuit in *Yaseli v. Goff, supra*, indicate that prosecutorial immunity was a settled doctrine when the civil rights statute was enacted in 1871. Therefore, since prosecutorial immunity derives from the same sources as judicial immunity, it must likewise follow that Congress would have specifically provided for abolition of the doctrine in enacting 42 U.S.C. § 1983 if it had so intended. *See Pierson v. Ray, supra*, 386 U.S. at 554-55.

With one exception, the courts of appeals are in general agreement that public prosecutors are immune from suit under section 1983 for acts committed in the performances of quasi-judicial duties in the prosecution of criminal cases. *Hampton v. City of Chicago,*

Cook County, Illinois, 484 F. 2d 602, 607-09 and n. 7 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); *Barnes v. Dorsey,* 480 F. 2d 1057, 1060 (8th Cir. 1973); *Madison v. Gerstein,* 440 F. 2d 338, 340-41 and n. 5 (5th Cir. 1971); *Ney v. State of California,* 439 F. 2d 1285, 1287 (9th Cir. 1971); *Guedry v. Ford,* 431 F. 2d 660, 663-64 (5th Cir. 1970); *Wilhelm v. Turner,* 431 F. 2d 177, 180-83 (8th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971); *Kauffman v. Moss,* 420 F. 2d 1270, 1272-73 (3d Cir. 1970), *cert. denied,* 400 U.S. 846 (1970); *Peek v. Mitchell,* 419 F. 2d 575, 578-79 (6th Cir. 1970); *Marlowe v. Coakley,* 404 F. 2d 70, 71 (9th Cir. 1968), *cert. denied,* 395 U.S. 947 (1969); *Fanale v. Sheehy,* 385 F.2d 866, 868 (2d Cir. 1967); *Carmack v. Gibson,* 363 F. 2d 862, 864 (5th Cir. 1966); *Bauers v. Heisel,* 361 F. 2d 581, 584-91 and nn. 7-9 (3d Cir. 1966), *cert. denied,* 386 U.S. 1021 (1967); *Rhodes v. Meyer,* 334 F. 2d 709, 717-18 (8th Cir. 1964), *cert. denied,* 379 U.S. 915 (1964), 383 U.S. 939 (1966); *Hurlburt v. Graham,* 323 F.2d 723, 725 (6th Cir. 1963); *Phillips v. Nash,* 311 F. 2d 613, 616 (7th Cir. 1962), *cert. denied,* 374 U.S. 809 (1963); *Laughlin v. Rosenman,* 163 F. 2d 838, 842-43 (D.C. 1947). Of course, a prosecuting attorney is not shielded by immunity when he engages in activities that are not part of his quasi-judicial function. *See, e.g., Robichaud v. Ronan,* 351 F. 2d 533 (9th Cir. 1965) (prosecutor acted as policeman in interrogation of murder suspect); *Lewis v. Brautigam,* 227 F. 2d 124, 128-29 (5th Cir. 1955) (prosecutor allegedly directed police efforts to extort a plea of guilty from a suspect).

Hilliard v. Williams, 465 F. 2d 1212, 1217 (6th Cir.), *cert. denied,* 409 U.S. 1029 (1972), is the sole

exception to the general rule that prosecutors are absolutely immune from suit for acts which constitute part of the judicial process. It contains no analysis of the policy behind the doctrine of absolute immunity and appears to be a misapplication of the rule followed in the *Robichaud* case, a rule that applies only to acts falling wholly outside the prosecutorial role in the judicial process.

The immunity of both judges and prosecutors has always been held to be absolute and unconditional. The broad scope of this immunity is founded on considerations of public policy. With respect to the doctrine of judicial immunity, this Court has stated:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the prosecution or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Citations omitted.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray, supra,* 386 U.S. at 554.

Like considerations support the absolute immunity of public prosecutors from suits based on acts committed in the course of criminal prosecutions. The lead-

ing case, affirmed by this Court in a *per curiam* opinion, couched the doctrine of prosecutorial immunity in terms remarkably similar to those used by Chief Justice Warren for the majority in *Pierson v. Ray:*

> "In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case." *Yaseli v. Goff, supra,* 12 F. 2d at 406.

Since the *Pierson* decision clearly establishes that the common law immunities not expressly abrogated by Congress in the adoption of 42 U.S.C. § 1983 apply in civil rights litigation, it is of no moment that *Yaseli* was decided in the context of a tort suit for malicious prosecution rather than an action brought directly under section 1983.

Furthermore, the approach utilized by this Court in *Pierson* does not admit of qualifications to immunities which were absolute at common law. Once it is determined that an immunity existed at common law, that

immunity is given its full scope in civil rights litigation. A judge's immunity is absolute in civil rights cases because that immunity was absolute at common law; a police officer has no absolute and unqualified immunity in such suits because he had none at common law. *Pierson v. Ray, supra,* 386 U.S. at 554-55. This approach should be followed here as well, since the passage of time has eroded none of the policy considerations which led to the creation at common law of an absolute, quasi-judicial immunity for prosecutors for acts which are an integral part of the judicial process. Indeed, nowhere in his brief does petitioner contend that the underpinnings of the doctrine have been altered so as to require immunity once absolute now be qualified. Petitioner concedes the wisdom of prosecutorial immunity for acts performed by prosecutors in the normal prosecutorial role. (Petn. Br. 35.)

Petitioner urges this Court to adopt a test that permits a civil rights suit against a prosecutor whenever it is alleged in the complaint that his acts were improper exercises of the prosecutorial power. In answering the dissent below, the Ninth Circuit wisely concluded that such an approach would effectively destroy the doctrine of prosecutorial immunity. The Court stated:

> "The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are not an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity

previously recognized, because the addition of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer." *Imbler v. Pachtman, supra,* 500 F. 2d at 1302 n. 2.

As Judge Learned Hand explained in *Gregoire v. Biddle,* 177 F. 2d 579, 581 (9th Cir. 1949), the reason for the doctrine of absolute immunity is that ". . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Under Judge Hand's well-reasoned view, abuse of prosecutorial power does not place the prosecutor's act outside the scope of his quasi-judicial function for purposes of immunity. Judge Hand explained:

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as

> would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." 177 F. 2d at 581.

The acts of respondent which allegedly harmed petitioner all involved the questioning of a witness during petitioner's 1961 criminal prosecution, and, as such, they can only be characterized as an "integral part of the judicial process." *Imbler v. Pachtman, supra,* 500 F. 2d at 1302-03. If a prosecutor is not absolutely immune from suit for the questions he asks and the answers he adduces in the course of a criminal trial, he may be more vulnerable than either the witnesses he calls or the attorneys in civil cases. In defamation cases, statements made by attorneys and witnesses in the course of formal judicial proceedings have been held to be absolutely privileged. *See, e.g., Mock v. Chicago, R.I. & P. R.R.,* 454 F. 2d 131, 133 (8th Cir. 1972); *Petty v. General Accident Fire & Life Assurance Corp.,* 365 F. 2d 419, 421 (3d Cir. 1966). The Second Circuit recognized this seeming anomaly stating:

> "To hold that an attorney of a private client is clothed with absolute privilege, and that a public prosecutor whose duty it is to enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence, that we cannot accept it."

* * *

Petitioner asserts that this Court should sanction a civil rights suit against a prosecuting attorney whenever that suit is preceded by the grant of a writ of habeas corpus on the same allegation upon which the

civil rights suit is based. (Petn. Br. 47-50.) At the outset, this proposed qualification to otherwise absolute immunity appears to conflict with the well settled rule that civil rights litigants need not exhaust other judicial remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983. *See Allee v. Medrano,* 416 U.S. 802, 814 (1974) (no requirement of exhaustion of state remedies). Such an *ex post facto* limitation on prosecutorial immunity also ignores the fact that the immunity doctrine itself recognizes that there will be instances where a prosecutor may be immune from suit for serious misconduct. As the court below observed, the balance between the evils at either extreme ". . . has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels, by granting immunity from suit to all prosecutors." *Imbler v. Pachtman, supra,* 500 P. 2d at 1304. This Court recognized that a similar balance was struck with respect to the absolute immunity accorded to members of the judiciary. *Pierson v. Ray, supra,* 386 U.S. at 554. While the interest of the individual litigant might be somewhat advanced by the qualification which petitioner urges on this Court, it is doubtful that the public interest would be served by making the prosecutor answerable in damages if, but only if, the plaintiff successfully convinces a federal district judge to reach a different result from that reached by the state judges who affirmed the plaintiff's conviction and denied post-conviction relief.

Finally, petitioner argues that prosecutors should be treated as members of the executive branch who have only a qualified immunity from suit as illustrated by this Court's recent decision in *Scheuer v. Rhodes, supra,* 416 U.S. 232 (1974). The basic weakness of petitioner's argument is that the American system of justice has never viewed the prosecutor as a functionary whose sole duty is to obtain convictions. Indeed, in *Berger v. United States,* 295 U.S. 78, 88 (1935), this Court expressly rejected such a narrow view of the prosecutor's role, stating:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

The American Bar Association's Code of Professional Responsibility uses similar language to describe the ethical obligation of the prosecuting attorney. ABA Code Prof. Resp. § EC 7-13. *See also* ABA Standards Relating to the Administration of Criminal Justice, "The Prosecution Function," § 1.1(c), at 83 (Compilation, 1974).

Thus, the majority opinion in the court below correctly disposed of petitioner's argument in reliance on *Scheuer v. Rhodes* when it stated:

> ". . . If anything, *Scheuer* tends to support our position. The Court there recognized . . . that the immunity of executive officers has historically 'been of a more limited nature' than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to cor-

rect errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity . . . designed to protect the judicial process; it attaches only to prosecutorial acts 'constituting an integral part of the judicial process.' " *Imbler v. Pachtman, supra,* 500 F. 2d at 1304 n. 4.

Conclusion

For the foregoing reasons, amicus curiae State of California joins respondent Pachtman in urging that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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